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Letter dated 17 April 2014 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council

We, the undersigned representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland (the Group of Like-Minded States on Targeted Sanctions), are writing to you on the issue of Security Council sanctions. Our Group is strongly committed to the effective implementation of the Council's sanctions regimes and closely follows the developments in the Al-Qaida and other sanctions regimes of the Council and the developments regarding United Nations sanctions at the level of national and regional courts. It is our belief that as long as national and regional courts consider United Nations sanctions to fall short of the minimum standards of due process, national authorities may find themselves legally unable to fully implement such sanctions at the national level. In that light, we would like to submit to Council members the attached paper entitled "Improving fair and clear procedures for a more effective United Nations sanctions system" (see annex).

We hope that the Security Council will find interest in our paper, in particular in the context of the upcoming consultations and negotiations in preparation for the adoption of a follow-up resolution to Council resolution 2083 (2012). We look forward to continuing and deepening the dialogue on this important matter with all members of the Council.

We should be grateful if you would have the present letter and its annex circulated as a document of the Security Council.

(*Signed*) Martin **Sajdik**
Ambassador
Permanent Representative of Austria to the United Nations

(*Signed*) Bénédicte **Frankinet**
Ambassador
Permanent Representative of Belgium to the United Nations

(*Signed*) Eduardo **Ulibarri**
Ambassador
Permanent Representative of Costa Rica to the United Nations

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(*Signed*) Ib **Petersen**
Ambassador
Permanent Representative of Denmark to the United Nations

(*Signed*) Jarmo **Viinanen**
Ambassador
Permanent Representative of Finland to the United Nations

(*Signed*) Harald **Braun**
Ambassador
Permanent Representative of Germany to the United Nations

(*Signed*) Christian **Wenaweser**
Ambassador
Permanent Representative of Liechtenstein to the United Nations

(*Signed*) Karel Jan Gustaaf **van Oosterom**
Ambassador
Permanent Representative of the Kingdom of
the Netherlands to the United Nations

(*Signed*) Geir O. **Pedersen**
Ambassador
Permanent Representative of Norway to the United Nations

(*Signed*) Mårten **Grundtz**
Ambassador
Permanent Representative of Sweden to the United Nations

(*Signed*) Paul **Seger**
Ambassador
Permanent Representative of Switzerland to the United Nations

Annex to the letter dated 17 April 2014 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council

Improving fair and clear procedures for a more effective United Nations sanctions system

Input paper by the Group of Like-Minded States on Targeted Sanctions (Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland)

Executive summary

The Group of Like-Minded States on Targeted Sanctions believes that as long as national and regional courts consider United Nations sanctions to fall short of the minimum standards of due process, national authorities may find themselves legally unable to fully implement them at the national level. In that light, the Group submits the following proposals to further improve due process:

(a) The Office of the Ombudsperson should be made permanent and the contractual arrangements for the position of the Ombudsman should be modified;

(b) Information-sharing between Member States and the Ombudsperson as well as between the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities or Member States and national regional courts should be improved;

(c) Transparency should be enhanced, namely, all decisions should contain adequate and substantial reasons and those reasons, as well as a redacted version of the comprehensive report, should be made publicly available;

(d) In the course of the triennial review, the Committee should actively confirm each listing and in case a listing is not reviewed and confirmed within the required three-year period, it should automatically be deleted;

(e) Ultimately, the Ombudsperson should be provided with the authority to decide whether to maintain a listing or delist an individual or entity;

(f) Due process should also be improved in other sanctions regimes.

I. Introduction

Targeted sanctions continue to serve as an important tool for the Security Council in exercising its primary responsibility for the maintenance of international peace and security under Chapter VII of the Charter of the United Nations. The Council has significantly enhanced fair and clear procedures within the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities. The establishment and strengthening of the Ombudsperson process by Council resolutions 1904 (2009), 1989 (2011) and 2083 (2012) were important steps toward an independent and effective sanctions review mechanism. The Office of the Ombudsperson makes a

valuable contribution to the accuracy and legitimacy of the Al-Qaida Sanctions List and thus to its effectiveness.

Nevertheless, considerable due process concerns persist and legal challenges have been filed in national jurisdictions around the world.[1] In Europe, both the European Court of Human Rights and the Court of Justice of the European Union confirmed in recent judgments — regarding the Al-Qaida sanctions regime but also with regard to a country-related sanctions regime[2] — that in the implementation of United Nations measures, actions of Member States remain subject to full judicial review as to their conformity with fundamental norms of due process. Those fundamental norms include, among others, respect for the right to be heard and other rights of the defence (right to have access to the file, subject to legitimate interests in maintaining confidentiality; right to ascertain the reasons for a decision) and the right to an effective remedy. It is possible to limit those rights, subject to the condition that this limitation pursues a legitimate aim, respects the principle of proportionality (including with regard to the duration of the measures) and does not infringe on the essence of the right in question.

As long as national and regional courts consider United Nations sanctions to fall short of the minimum standards of due process, national authorities may find themselves legally unable to fully implement them at the national level. This situation threatens the uniform and universal application of United Nations sanctions and needs to be addressed. Based on these considerations and in line with the continuous need to ensure due process in United Nations sanctions regimes, the Group of Like-Minded States on Targeted Sanctions invites the Security Council and Member States, where relevant, to consider the following proposals aimed at further improving the Ombudsperson process.

II. Proposals

A. Make the Office of the Ombudsperson permanent

The Office of the Ombudsperson should be made permanent and the contractual arrangements for the position of the Ombudsperson should be modified and improved. The status and privileges of the position should fully reflect the independence required to perform the tasks of the Ombudsperson effectively.

[1] See for example: Federal Court of Canada, *Abdelrazik v. the Minister of Foreign Affairs and the Attorney General of Canada* (4 June 2009) 2009 FC 580, para. 51. The action brought by the Al Rashid Trust remains pending in the Supreme Court of Pakistan on appeal by the Government from an adverse decision of 2003 and the similar challenge brought by Al-Akhtar Trust International remains pending before a lower court (See S/2014/41, annex, para. 7).

[2] See: European Court of Human Rights (Grand Chamber), *Nada v. Switzerland*, Application No. 10593/08, 12 September 2012; European Court of Human Rights (Chamber), *Al-Dulimi v. Switzerland*, Application No. 5809/08, 26 November 2013; Court of Justice of the European Union, *European Commission and United Kingdom of Great Britain and Northern Ireland v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013. For reference purposes, please find a brief unofficial summary of the main reasoning/arguments of the courts in the enclosure to the annex.

The measures described in paragraph 1 of Security Council resolution 2083 (2012)[3] on the other hand should continue to be reviewed every 18 months. Also, the contract term for the holder of the position of Ombudsperson should be reviewed every 36 months.

Currently, the individual selected by the Secretary-General to fulfil the role of Ombudsperson is hired on the basis of a consultancy contract. The current contractual arrangements fail to fully implement the Security Council resolutions and significantly impair the ability of the Ombudsperson to fulfil the mandate, in particular in terms of independence.[4] Making the Office permanent would give more weight and credibility to the Ombudsperson's work, enhance her or his independence and solve important administrative hurdles such as the funding of the Office. Nevertheless, a regular review of the extent and content of the mandate is necessary in order to adjust the Office to new and changing developments.

The provision to the Office of the Ombudsperson of resources necessary to fulfil the mandate of the Ombudsperson, including funds for translation and interpretation, should be timely. The general guidelines as to word limits for translation, applicable to parliamentary documents in the United Nations system, should not be applied to the comprehensive reports of the Ombudsperson.

Translation and interpretation in all relevant languages is an essential feature of due process. Lack of resources and funds for interpretation and translation impedes communication between the Ombudsperson and the petitioner. This proposal was only partially included in resolution 2083 (2012) (para. 22). There is still a word limitation which infringes on the independence of the Ombudsperson.

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[3] Namely, the obligations of Member States to take certain measures with respect to Al-Qaida and other individuals, groups, undertakings and entities associated with them (namely, asset freeze, travel ban and arms embargo).

[4] In more detail, this means:

(a) The contract of the Ombudsperson is a generic one applicable to all experts appointed to panels and expert groups assisting the Security Council in the field of sanctions. Since the Ombudsperson is merely a consultant, she or he cannot carry out any managerial functions in terms of staff members assigned to assist her or him or with reference to the administration of the Office. Structurally and despite the language in the relevant resolutions, the Office of the Ombudsperson has not been created. The frailties of these arrangements were recently exposed when a directive was issued by Department of Political Affairs officials to staff members requiring substantive trip reports for any travel with the Ombudsperson. Such reports directly interfere with the independence of the Ombudsperson and endanger confidentiality, which is critical to her work;

(b) The Ombudsperson and related Office has no dedicated budget and is allotted funds through a budget which, by title, is that of the Analytical Support and Sanctions Monitoring Team that assists the 1267 Committee. The Ombudsperson has no authority to manage the budget and is only implicated in the budget process at the discretion of Department of Political Affairs officials. This arrangement leaves the Ombudsperson vulnerable from a budgetary perspective and must be considered prejudicial to his or her or his independence;

(c) The current contractual arrangements do not provide for benefits (medical or other insurance, pension), paid leave, sick leave or moving expenses, and they figure on the lowest possible hierarchical level in terms of travel allowances. Furthermore, no United Nations travel documentation beyond a certificate that the person is a consultant is provided for, depriving the Ombudsperson of diplomatic privileges when travelling outside the United States of America. For all these reasons, it is unlikely that the current contractual arrangements will attract candidates with the necessary skill mix and experience for the position of the Ombudsperson in the future.

B. Improve information-sharing

1. From Member States to the Ombudsperson

The Security Council should encourage Member States to provide all the information available to the Ombudsperson and enter into confidentiality agreements or arrangements with the Ombudsperson.

The standard developed by the Ombudsperson for her or his analysis, observations and conclusions is to make an assessment of whether there is sufficient information to provide a reasonable and credible basis for the listing. Based on all the information available in the present day, the Ombudsperson determines whether a continued listing is justified. Member States' cooperation with the Ombudsperson in terms of information-sharing and the provision of confidential material must be further improved. The level of detail and supporting information should be enhanced. Further progress should be made with regard to access to confidential information. The Like-Minded Group notes that for more than a year, only one additional confidentiality arrangement with the Office of the Ombudsperson has been concluded and thus encourages Member States to redouble their efforts in this regard.

2. From the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities and Member States to national or regional courts

It is important that the flow of information from the sanctions Committee and relevant Member States to national or regional courts be achieved when there are proceedings at the national or regional levels.

Challenges at a national or regional level that have already been filed might continue. Moreover, it is not unlikely that petitioners will file new claims as well. In that event, national or regional courts would be much better equipped to uphold United Nations-based listings if they had access to (at least parts of) the material on which the Committee's listing decision was based.

C. Enhance the transparency of the Ombudsperson process

Domestic, regional and international courts and tribunals need to be able to determine whether the Ombudsperson process constitutes an effective remedy for the affected individuals and entities. Only then will they be in a position to judge and acknowledge that the United Nations system provides for adequate protection of fundamental due process rights. In order to enable them to do this, the transparency of the Ombudsperson process has to be further strengthened, including by publishing the comprehensive report as well as the reasoning behind each decision.

1. Reasoning behind decisions to delist or to maintain a listing

All decisions regardless of whether they maintain a listing or delist an individual or entity should contain adequate and substantial reasons.

Where a listing is maintained or a petitioner is delisted on the basis of the recommendation by the Ombudsperson, the Ombudsperson should provide the reasons for that determination to the petitioner without undue delay, with appropriate safeguards regarding confidential material.

In case the Committee decides not to follow the recommendation by the Ombudsperson, it should provide the reasons to the petitioner through the Ombudsperson without undue delay, with appropriate safeguards regarding confidential material.

Lastly, provision should be made for the Ombudsperson to make the reasons publicly available or to disseminate them to interested individuals, States or other bodies, with appropriate safeguards regarding confidential material.

In all communications with the petitioner, interested individuals, States or other bodies, the Ombudsperson shall respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States.

It is particularly important to inform the petitioner about the reasons behind a decision to maintain a listing. Only then is the petitioner able to change her or his behaviour and to successfully request delisting at a later stage. Resolution 2083 (2012) acknowledges this in principle (para. 14 of annex II). However, the reasons are provided by the Committee through the Ombudsperson with significant delay and with limited factual and analytical references. Where the recommendation of the Ombudsperson is followed, the Ombudsperson is in the most advantageous position to prepare and provide the reasons to the petitioner. Therefore, the Ombudsperson should provide the reasons based on the comprehensive report directly to the petitioner. This would enhance timeliness and transparency as well as ensure coherence between the comprehensive report and the reasons. Where the recommendation of the Ombudsperson is not followed, the Ombudsperson should also be made aware — in addition to the petitioner — of the actual and specific reasons of a decision by the Committee, since these reasons may have a bearing in the assessment of other cases. Otherwise, there is a risk of inconsistency between the practice of the Ombudsperson and the practice of the Committee.

Since the petitioner is provided with the reasons for a delisting or the maintaining of a listing and is free to pass those reasons on, they may as well be made publicly available. This would further enhance the transparency and credibility of the Ombudsperson process.

2. Publication of a redacted version of the comprehensive report

A redacted version of the comprehensive report of the Ombudsperson should be published, allowing for legitimate privacy, security and confidentiality interests to be adequately protected.

At present, the comprehensive report is not made available to interested States, the petitioner or the public. As a result, the reasoning of the Ombudsperson is not generally available. Publishing a redacted version of the comprehensive report of the Ombudsperson would enhance the transparency of the Ombudsperson process. Prior to publication, the designating State(s) and other Member States that delivered confidential information would have to give their approval with regard to the parts of the redacted report that contains or is based on such confidential information.

The publication of the redacted report is particularly important in cases where a listing was maintained. In fact, increased transparency at the United Nations level through the availability of the reasoning followed by the Ombudsperson would most likely reduce the number of (successful) challenges in national and regional courts,

given that the courts would be able to have a better understanding of the proceedings at the United Nations level, namely, what conclusions were drawn and, more importantly, how they were determined.

D. Review and time limits of all listings

The Committee must continue to conduct the triennial review in a timely and thorough manner and regularly inform Member States about the results of all reviews referred to in resolution 2083 (2012). In the course of the review, the Committee should actively confirm each listing in order to maintain it on the list. In so doing, the Committee should give reasons why a listing remains appropriate. In case a listing is not reviewed and confirmed within the required three-year period, it should automatically be deleted.

The outcome of the triennial review is highly dependent on arguments provided by and the cooperation of the designating State. Currently, the Committee needs to take a decision to remove a listing under review: in case of inaction, the listing remains. Requiring active confirmation by the Committee would mean that the Committee has to decide to maintain the listing. That is to say, if there is no consensus within the Committee to maintain the listing, the individual or entity will be delisted. Introducing a higher threshold to maintain a listing would underline the preventive and temporary nature of the sanctions measures.

III. Ultimate objectives

A. Enable the Ombudsperson to take effective delisting decisions

The Ombudsperson should be provided with the authority to decide whether to maintain a listing or delist an individual or entity.

With a view to avoiding future national or regional court judgements that strike down measures implementing United Nations sanctions owing to the lack of conformity with due process norms and other fundamental rights, the Ombudsperson should be given decision-making power with regard to delisting requests. Otherwise, the Committee would retain the possibility to act as the judge in its own cause, which is not in conformity with the right to an effective remedy. On the other hand, nothing would prevent the Committee from relisting the individual or entity if new facts emerge after a delisting decision.

B. Provide for the Ombudsperson process as a first remedy

Member States and relevant international organizations and bodies should encourage individuals or entities that consider challenging their listing through national and regional courts to first seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson before or at least in parallel to instigating court proceedings.

If the Ombudsperson were given the authority to decide whether to maintain a listing or delist an individual or entity and the procedures were in conformity with basic norms of due process, it clearly would be more advantageous to petitioners to submit their delisting requests at the United Nations level rather than in national or regional courts. To a certain extent, this is already the case today. The time frames of the Ombudsperson process are relatively narrow: within nine months (at the

most) of depositing her or his request, the petitioner is granted a decision with regard to her or his delisting; national procedures, on the other hand, may take several years. Therefore, it is the Ombudsperson process that should be seized first by individuals or entities petitioning for a delisting.

Resolution 2083 (2012) incorporates this idea in paragraph 24 in that it requests that Member States and relevant international organizations and bodies encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson. This could be emphasized and combined with stronger wording. Ways should be explored whereby courts (national or regional) would suspend their proceedings while a case is pending before the Ombudsperson.

IV. Improve due process in other sanctions regimes

A. Extension of the mandate of the Ombudsperson to other sanctions regimes

Gradually extending the important procedural safeguards of the Ombudsperson process to other appropriate sanctions regimes should be considered. Accordingly, consideration should be given to equipping the Office of the Ombudsperson with adequate resources.

Currently, only individuals and entities listed on the Al-Qaida Sanctions List have access to the Ombudsperson process. Yet, similar due process concerns exist in other Security Council sanctions regimes. Some of the country-specific sanctions regimes do not in fact target a country or its regime and its policies. Instead, they target persons, groups and entities in stark and often violent opposition to the internationally recognized Government and its policies. Thus, they do not enjoy the protection of their rights and interests that a Government with access to diplomatic channels and representation at the United Nations would normally offer. Persons listed under those Security Council sanctions regimes have also started to challenge their listing under legal acts implementing Council designations. In November 2013, the European Court of Human Rights decided the *Al-Dulimi* case relating to Security Council resolution 1483 (2003) on Iraq. The Chamber declared that the focal point procedure did not offer equivalent protection of fundamental rights. The Security Council should therefore consider the possibility of extending the mandate of the Ombudsperson to other (appropriate) regimes on the occasion of their next mandate renewals. The possibility of adapting the mandate of the Ombudsperson to the various sanctions regimes should also be explored.

B. Introduce due process safeguards for listing and delisting procedures in other sanctions regimes

When proposing names to a sanctions Committee for inclusion on a Consolidated List, Member States should be required to provide a detailed statement of case. Member States should identify the parts of the statement of case that may be publicly released and the parts that may be released upon request to interested States.

After a name is added to a Consolidated List, a narrative summary of reasons for listing should be made accessible on the Committee's website.

The Secretariat shall notify the permanent mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national. Subsequently, those Member States should notify or inform in a timely manner the listed individual or entity of the designation. The notification/information should include a copy of the publicly releasable portion of the statement of case, the summary of reasons, a description of the effects of designation and information on where to submit a delisting request.

In addition to the possibility of submitting a delisting request to the/an Ombudsperson, other basic due process safeguards should be introduced in other sanctions regimes as well.

C. Extension of the "holds procedure" time limits adopted by the 1267/1989 Committee to other sanctions regimes

The Security Council should direct all sanctions Committees to amend their guidelines to ensure that no decision to maintain a listing or to delist is left pending before the Committee for a period longer than six months, unless the Committee determines on a case-by-case basis that extraordinary circumstances require additional time for consideration. Accordingly, all sanctions Committees should amend their guidelines following the model of the guidelines of the 1267/1989 Committee.

The right to have cases decided within a reasonable time is an essential element of due process. The past practice in the 1267/1989 Committee of placing holds on proposed decisions, some of which were left undecided for years, was successfully put to an end in 2010. Extending time limits for placing holds on proposed decisions to all sanctions Committees would be an important element of due process and would significantly strengthen the fairness and transparency of decision-making in all sanctions Committees.

Enclosure

Summary of main arguments of the European Court of Human Rights and the Court of Justice of the European Union

European Court of Human Rights, *Nada v. Switzerland* September 2012

- Article 13 of the European Convention on Human Rights demands that there must be a remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (para. 207).
- Article 13 seeks to ensure that anyone who makes an arguable complaint about a violation of a Convention right will have an effective remedy in the domestic legal order (para. 208).
- The European Court of Human Rights then cites the Swiss Federal Court: "Delisting procedure of the United Nations is not an effective remedy within the meaning of article 13 of the European Convention on Human Rights" (para. 211). (However, the Swiss Federal Court's statement was made in 2007, namely, before the establishment of the Office of the Ombudsperson).
- The Swiss authorities did not examine the merits of the applicant's complaints concerning the alleged violation of the Convention (para. 210).
- There was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at the national level pursuant to those resolutions (para. 212).

Court of Justice of the European Union, *European Commission and United Kingdom of Great Britain and Northern Ireland v. Yassin Abdullah Kadi*, July 2013

- The Court notes that with regard to the listing/the decision to maintain the listing, only the narrative summary of reasons was provided to the authorities that are obliged to implement the resolution. No other evidence was provided (paras. 107-110).
- The authorities are obliged to disclose the summary of reasons to the applicant (para. 111) and to ensure that the applicant is in a position in which he or she may effectively make known his or her views on those reasons (para. 112).
- Further, the authorities must examine whether those reasons are well-founded (para. 114).
- For this careful and impartial examination, the Committee and the designating State must disclose the relevant information and evidence (para. 115). The allegations factored in the summary of reasons must be verified, namely, it must be assessed whether at least one of the reasons is substantiated. If not enough information is disclosed, the decision will be based solely on the material that has been disclosed (para. 119).
- Such a review by national authorities is all the more essential since, despite additional improvements (in particular after the adoption of the contested regulation, namely, after 28 November 2008), the procedure for delisting and ex officio re-examination at the United Nations level do not provide the guarantee of effective judicial protection (para. 133).

- The essence of effective judicial protection must mean to obtain a declaration from a court by means of a judgement ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed; that the listing of a person's name or the continued listing of her or his name on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute a form of reparation for the non-material harm she or he has suffered (para. 134).

European Court of Human Rights, *Al-Dulimi v. Switzerland*, November 2013

- States parties to the European Convention on Human Rights are not prevented from transferring competences to international organizations. However, they remain responsible under the Convention for all acts and omissions of their own organs, regardless of whether they result from an obligation deriving from their membership in the international organization. If the organization offers protection of fundamental rights that is equivalent to the European Convention on Human Rights, it is presumed that the State acted in conformity with the Convention if it simply implements its obligations deriving from its membership. Where the State has discretion, on the other hand, all acts have to be in strict conformity with the European Convention on Human Rights (para. 114).

- Security Council resolution 1483 (2003) leaves no discretion to United Nations Member States (para. 117). The requirement of equivalent protection also applies to the United Nations (para. 116).

- The focal point mechanism does not provide for equivalent protection. The Court endorses the conclusion of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism that the 1267 regime does not guarantee the respect of the minimal standard (even after resolution 1989 (2011)). A fortiori, the 1483 regime cannot be said to provide for equivalent protection either (paras. 118-120).

- As a result, the Court examines whether the applicant's right to a remedy has been violated. The Court concludes that the lack of equivalent protection at the United Nations level was not compensated by the national proceedings, as the Swiss Federal Court did not review the lawfulness of the measures taken. Special consideration was thereby given to the time that had elapsed since the asset freeze had been implemented (proportionality) (paras. 126-134).